A

GUAN HENG CONSTRUCTION WORKS

v.

IMM WHITE BUTTON MUSHROOM (M) SDN BHD & ANOTHER CASE

B

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[CIVIL SUITS NO: 22-302-2009 & 22NCVC-117-2011]
21 JUNE 2013

C

CONTRACT: *Illegality - Agreement - Two contracts signed with different tender prices - Whether contract for bigger sum formed to deceive third party in order to obtain higher loan - Whether contract for higher sum a sham - Whether enforceable - Whether plaintiff estopped from*
D *asserting claim under contract for bigger sum - Whether evidence for non-payment could be adduced - Whether plaintiff liable for defective works - Whether defendant entitled to forfeit retention sum to rectify defects*

CIVIL PROCEDURE: *Pleadings - Defence - Failure to plead estoppel and illegality - Whether defence applied*

E

The defendant awarded a contract for the construction of a factory to the plaintiff, a local subcontractor. The Malaysian Industrial Development Finance Berhad ('MIDF') was the financier for the costs of the construction. Two contracts were
F produced in court dated the same but one for RM7,910,936.50 and the other for RM15,821,873. The project was mutually terminated with a completion at 92% but the plaintiff was not paid for the balance due under the consultant's certification. The defendants contended that what was due to the plaintiff was half
G the amount certified as the parties knew that the contract with the higher sum was merely to satisfy MIDF so that a higher loan sum could be obtained and therefore, the contract for the higher sum bound the parties. There were two suits that were consolidated and heard together. Suit 1 was the plaintiff's claim
H for the balance amount due under the certification, *ie*, the bigger sum of the contract. The defendant then filed a counter-claim and set-off against the plaintiff in Suit 1 for RM907,039.99 being the sum to rectify some defects, in particular, the sunken floor. Suit 2 was filed by the plaintiff for the sum of RM791,093.65 being the
I retention sum which was due to be released to the plaintiff by the defendant. However, the defendant contended that the true retention sum was only for half the amount *ie*, RM395,218.73 and

repeated its defence in Suit 1 that there were defects in the construction which was not rectified and the costs for such rectification amounted to RM907.039,33. The issues that arose for consideration were, *inter alia,* (i) whether the contract was for RM7.9 million or RM15.8 million; (ii) whether the contract for RM15.8 million was a sham contract; (iii) whether a sham contract was enforceable; (iv) whether the plaintiff was estopped from asserting its claim under the contract for the bigger sum by adducing evidence of non-payment; (v) whether estoppel and illegality was applicable although not pleaded in defence; and (vi) whether the plaintiff was liable for the defective works and the defendant was thus entitled to forfeit the retention sum as the floor remained unrectified after it had sunk for the second time.

Held (allowing plaintiff's claim in Suit 1; dismissing plaintiff's claim in Suit 2):

(1) The contract for the smaller sum was the contract that the parties had agreed to be bound by and that the contract of the bigger sum was a sham. In light of the clear evidence that negated the bigger sum contract, this court would not allow the plaintiff to resile from what the parties had agreed. Thus, the defendant had proved that the governing contract was for the smaller sum of RM7.9 million. (paras 18, 19 & 66)

(2) From the terms of the factory loan, MIDF would only release 57.73% of the amount certified as due under the construction of the factory to the plaintiff provided that the plaintiff had confirmed with MIDF that it had received the balance of 42.27% due on each certificate of payment from the defendant. Thus, to get full financing, this device of a contract for double the real sum had been entered into which was no doubt a sham contract for the purpose of satisfying MIDF for the loan of a bigger sum. Parties had never intended to be bound by it but by the contract for only half that sum. (para 56)

(3) To allow the plaintiff to sue based on the sham contract for a bigger sum was unconscionable. Where a party had found its claim based on a genuine contract and not a sham contract, the genuine contract may be enforceable. Where a party had unconscionably tried to capitalise on the situation by claiming based on the sham contract, the court would restrict the claim just to the genuine contract. The RM15.8 million

A contract was a sham and thus, unenforceable and the amount of RM7.9 million was in substance what the parties had agreed to be bound and enforceable. The saving grace was that the building was built *albeit* that the floor sank twice after rectification. In the interest of justice, the court was prepared B to decide the parties' obligations on the part that they had agreed to be binding based on the initial sum of RM7.9 million. (paras 67, 68 & 70)

(4) The plaintiff was estopped from asserting its claim under the C stamped contract for the bigger sum. The plaintiff could not confirm to a third party in MIDF that the balance of 42.27% had been paid under each certificate of payment and then *inter se* between it and the defendant. The parties had conducted themselves based on the smaller sum contract and had, by the D device of a 50% discount, or that of deemed payment as in the various confirmation of payment letters from the plaintiff to MIDF. The plaintiff was estopped from introducing evidence of non-payment based on the bigger sum of contract of RM15.8 million by virtue of s. 115 of the Evidence Act 1950. E (paras 57-59)

(5) Although the word estoppel or estopped did not appear in the defendant's defence, it was a case where the facts of estoppel had been germane in the pleadings and indeed introduced at the trial by the defendant. Where there was no pleaded case F of estoppel but there were material facts sufficiently pleaded without using the word estopped, it was the duty of the court to consider the evidence and submissions and come to a decision whether estoppel applied (*Oversea-Chinese Banking Corp Ltd v. Philip Wee Kee Puan*; refd). (para 60) G

(6) The defendant had not pleaded illegality but rather, the defendant had used the euphemism of the plaintiff that agreed to a 50% discount. It was well settled law that where a contract was *ex facie* illegal, the court would decline to enforce H it irrespective of whether illegality was pleaded or not (*Seven Seas Supply Co v. Rajoo*; refd). (para 61)

(7) Although the defendant had not effected the rectification works to the sinking floor, it did not prevent it from making a I claim on what was a *bona fide* reasonable assessment of costs to be incurred to rectify the defects. As it was an estimated cost of RM907,039 and the plaintiff had not called other

witnesses to testify otherwise, the plaintiff could not complain if the sum that the court awarded was higher than what the plaintiff thought was fair. The burden should be borne partly by the consultant for a lack of supervision. The whole of the defendant's counter-claim was not allowed but the whole sum retained would be sufficient payment of damages for the counter-claim of the defendant. As the plaintiff had not rectified the sunken floor, it was justified for the retention sum to be forfeited entirely to the defendant. (paras 72, 78 & 79)

(8) The parties had agreed that the sum under the contract was RM319,132.50 which was due under the first suit from the certified claims if the plaintiff's claim was allowed based on the contract for the lower sum of RM7.9 million. The plaintiff was allowed to enter judgment against the defendant for the above sum with interest of RM5% per annum from the date of writ to realisation. The retention sum of RM395,546.83 as damages for the rectification works for the floor that sunk as corollary to the plaintiff's claim in Suit 2 for the return of the retention sum was dismissed. (paras 82 & 83)

Case(s) referred to:

Afro-Asia Shipping Company (Pte) Ltd v. Da Zhong Investment Pte Ltd & Others [2004] 2 SLR 117 ***(refd)***

AG Securities v. Vaughan & Ors [1990] 1 AC 417 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(foll)***

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***

Dodd Properties Ltd and Another v. Canterbury City Council and Others [1980] 1 WLR 433 ***(refd)***

Kalki Jewellery (Suing as a Firm) v. Mani Samikkannu [2000] 2 SLR 179 ***(refd)***

Ong Thean Chye & Ors v. Tiew Choy Chai & Anor [2011] 1 CLJ 674 CA ***(refd)***

Sardara Ali v. Sarjan Singh [1957] 1 LNS 78 HC ***(refd)***

Seven Seas Supply Co v. Rajoo [1965] 1 LNS 164 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 65(1)(c), 114(g), 115

Evidence Act [Sing], s. 67(1)(c)

A *For the plaintiff - Joseph Ting (Tan Chun Ming with him); M/s Joseph Ting & Co*
For the defendant - Terence Naidu (Syafiqah Khazariman with him); M/s Gibb & Co

B *Reported by Sandra Gabriel*

JUDGMENT

C **Lee Swee Seng JC:**

[1] The defendant wanted to build a factory for its new business. It was that of processing white button mushroom. It was also to serve as a fertiliser factory. It had a piece of land big enough for such an enterprise. The dimension of the factory
D was about 90 feet by 220 feet. It decided to award the contract for its construction to the plaintiff being a local subcontractor with some experience. It engaged Koh Perunding as its superintending officer and its civil and structural consultant upon the recommendation of the plaintiff. Malaysian Industrial
E Development Finance Berhad (MIDF) was the financier of part of the construction costs.

[2] There was a contract signed with a summary of the tender price or perhaps two contracts signed, according to the defendant.
F At any rate there were produced in court two contracts dated the same date, one for RM7,910,936.50 and the other for RM15,821,873 which of course is double the amount. The plaintiff started construction and the project was mutually terminated with completion at 92%. The floor sank and after rectification, it sank
G again! What was worse was that it sank unevenly. Tension was in the air!

[3] The plaintiff was not paid for what it claimed was the balance due under the consultant's certification. The defendant said what was due was just half of the amount certified as parties
H knew all along that the bigger contract was just to satisfy MIDF so that it could give a bigger loan. The actual contract which the defendant said is the one binding is for half the amount and that the parties had in their dealings with each other conducted themselves consistent with that knowledge and understanding.

I

[4] The plaintiff contended that it was the bigger contract that was stamped and so binding on the parties. The plaintiff sued based on the bigger sum contract and later proceeded to sue for a return of the bigger sum retention amount. The defendant cried foul! It depended on an oral agreement of a 50% discount! Alternatively it was the understanding of the parties that the true contract between them was the first contract for half the amount. Problem was further compounded by the factory floor that sank a second time after rectification. So the defendant put in a set-off and counterclaim for over RM900,000 to the plaintiff's first suit being the amount to rectify the sunken floor.

[5] The refrain must have reverberated through them as they ruminate on how to resist each other's claims: "O what a tangled web we weave when we devise to deceive."

Personalities And Preliminaries

[6] The plaintiff called three witnesses:

(a) PW1 Koh Liong Boon, the proprietor of Koh Perunding who was the consultant and superintending officer under the contract.

(b) PW2 Tan Chong Kang, a partner of plaintiff.

(c) PW3 Tan Chong Meng, a partner of the plaintiff and PW1's brother.

[7] The defendant called DW1 Chin Ivan Oi Fook, the managing director of the defendant.

[8] The following documents were marked for each of reference:

Bundle of Pleadings	A
Common Bundle of Documents 1	B1
Common Bundle of Documents 2	B2
Common Bundle of Documents Supplemental	C

[9] By consent parties agreed that all documents in part A and part B are automatically accepted as exhibits and evidence subject only to weight to be attached. They shall be referred to by page

numbering and bundle alphabet. All documents in part C are to be marked in accordance with the admission of documents under the Evidence Act 1950.

Prayer

[10] There are two suits that were consolidated and heard together in this trial. One is Suit No: 22-302-2009 being the plaintiff's claim for the balance amount due under the certification *albeit* based on the bigger sum contract. It was for the sum of RM7,324,892.16 based on the amount unpaid for each certificate of payment even though the defendant contended that all certificates of payments have been paid in full with the plaintiff's confirmation in writing to MIDF for otherwise MIDF would not have released the balance payment due under each certificate if the differential sum had not been paid by the defendant direct to the plaintiff. At the trial the defendant made an oral amendment to para. 4 of its defence by amending the balance sum of RM638,235 to RM638,265 being the balance outstanding to the plaintiff and with the plaintiff agreeing to give a 50% reduction, the balance due to the plaintiff was only RM319,132.50. The defendant put in a set-off and counterclaim for the sunken floor of RM907,039 being the costs for rectifying it.

[11] The second is Suit No: 22-117-2011 for the sum of RM791,093.65 being the retention sum which the plaintiff contended is due for release to the plaintiff and so is owing to them as a debt which it is suing for in this suit. It contended that it did not cause nor is responsible for the sunken floor. The defendant contended that the true retention sum was for only half the amount which was RM395,218.73. The defendant basically repeated its defence in Suit No: 22-302-2009 in that there were defects not rectified and in particular the floor that had sunk some three inches and that the costs of rectification was RM907,039.99 as demanded from the plaintiff. The defendant contended that for so long as the sunken floor was not rectified the plaintiff was not entitled to any payment from the retention sum.

Parol And Paper Evidence

Whether The Contract Was For RM7.9 Million Or For RM15.8 Million

[12] It is irrefutable that there were two contracts signed on the same day and dated 2 October 2006. The contract for the RM7.9 million was signed by the plaintiff, the defendant and Koh Perunding. The original was produced in court for inspection of all parties and marked as exh. D5. Parties did not deny that they did sign this contract for a lesser sum of RM7.9 million. However this contract was not stamped.

[13] The parties also signed another contract on the same day dated 2 October 2006 for the same project and the same scope of work but this time for double the price at RM15.8 million. The only difference was that this one was stamped. Of course, it is rather odd for there to be two different contracts for the same project and scope of works and the only difference other than the stamping is the price difference between RM7.9 million and RM15.8 million; the stamped copy being double that of the unstamped copy! To help us visualise the difference better, the relevant pages where the pricing is concerned are set out in full in the summary of tender below with the bigger sum stamped contract being juxtaposed side by side the lower sum contract in the last column:

SUMMARY OF TENDER

Item	Description	Rate (RM)	Amount (RM)	Amount (RM)
1.	Preliminaries and general conditions of contract including workmen compensation and contractor's All Risks and CIDB Contribution.	L.S.	103,320.00	206,640.00
2.	Sum for supply, construction and completion of the Farm House building including Water Storage Tank, Pump Sump, Pump House etc. including all finishes, excluding insulation panels as per drawings and specifications.	L.S.	3,180,755.00	6,361,510.00

Item	Description	Rate (RM)	Amount (RM)	Amount (RM)
3.	Sum for supply, Construction and Completion of the Three Storey Office Block including Loading Bays, Ramps etc. including all finishes excluding insulation panels as per drawings and specifications.	L.S.	1,177,815.00	2,355,630.00
4.	Sum for supply, Construction and Completion of the Hostel Block including all finishes as per drawings and specifications.	L.S.	756,810.00	1,513,620.00
5.	Sum for supply, Construction and Completion of the Compost Factory including 110' x 120' Open Shed Concrete Floor, Concrete Buildings, mechanical rooms, etc. as per drawings and specifications.	L.S.	422,888.00	845,776.00
6.	Sum for supply, Construction and Completion of the 80' x 200' Open Shed as per drawings and specifications.	L.S.	225,000.00	450,000.00
7.	Sum for supply, Construction and Completion of Laying of Sewer Lines, Manholes, Pump Sump, Construction of Sewage Treatment Plant etc. as per drawings and specifications.	L.S.	180,000.00	360,000.00
8.	Sum for supply, Construction and Completion of the Cold Water Supply System including One Unit Water Tank, One Unit Pump House, One Unit Suction Tank, All Pipes and Hydrants, Pumps etc. as per drawings and specifications.	L.S.	227,000.00	454,000.00
9.	Sum for supply, Construction and Completion of Fencing, Guard House etc. as per drawings and specifications.	L.S.	69,800.00	139,600.00
10.	Sum for supply, Construction and Completion of All Drainage Works including Iron Gratings Covers and Outfall Structures etc. as per drawings and specifications.	L.S.	308,457.00	616,914.00

Item	Description	Rate (RM)	Amount (RM)	Amount (RM)
11.	Sum for supply, Construction and Completion of all Internal Road Works, Car Parks, Lorry Parks etc. as per drawings and specifications.	L.S.	427,623.00	855,246.00
	Sub Total Carried Forward		**7,079,468.00**	**14,158,936.00**
Item	**Description**	**Rate (RM)**	**Amount (RM)**	**Amount (RM)**
	Sub Total Carried Forward		**7,079,468.00**	**14,158,936.00**
12.	Sum for supply, Construction and Completion of Main Access from JKR Roads. as per drawings and specifications.	L.S.	158,268.00	316,536.00
13.	Sum for landscaping works to approving authority's requirements.	L.S.	25,000.00	50,000.00
14.	Sum for Supply all piling works including supply pitch and drive 150 x 150 mm R.C. Piles at an all in rate of RM per 6mm length.	L.S.	628,200.00	1,256,400.00
15.	Any other works not included in items above but deemed necessary for successful completion of the contract.	L.S.	20,000.50	40,001.00
	Total Carried Forward To Form Of Tender		**7,910,936.50**	**15,821,873.00**

Period of Completion : 11 months

[14] As has often been said, things just don't happen to happen; there must be a reason for it. In deciding who is telling the truth, the court will of course have to consider the reasonableness or otherwise of the parties' explanation viewed against the backdrop of the parties' conduct and the correspondence between the relevant parties and even with third parties like MIDF. We know from the benefit of experience and the behaviour of people that humans would generally act consistently with what they believe to be true. Our beliefs determines our behaviour and our credo constrains and indeed compels us to act consistent with our conduct and conversation.

PW2 is the son of Tan Guan Hua who signed both the contracts. PW2 was the one who supervised the construction project to a large extent. His explanation was that the bigger contract for double the amount was that the materials were different and in

A fact better materials. Even accepting that a factory can be constructed at any price that the owner is prepared to pay, one still would have to descend to details as to where the differences lie rather than multiplying by two every item of the works. PW2 was not able to explain where the differences lie.

B

[15] In fact PW1 confirmed that there was an earlier summary of tender dated 25 September 2006 marked as part of exh. D5 signed by the defendant for RM7,910,936.50 at pp. 293-298 of B2. That was followed by the acceptance of tender dated
C 2 October 2006 signed by the plaintiff and the defendant and witnessed by Koh Perunding. Together they formed the contract for the smaller sum. When confronted under cross-examination PW1 sheepishly admitted that there were two contracts and the stamped one for double the sum probably for the purpose of
D getting a bigger loan from MIDF. Very tellingly, PW1 did not say that the difference in the sum was because of different specifications. PW1 would surely have known about this if there was such a thing, he being the civil and structural engineer and superintending officer (SO) of the project.

E

[16] PW2 testified that when D5 was prepared it was done without the project drawings and that he would take one to two days to study the drawings and to arrive at a review of the materials for the project. That explanation militates against the fact
F that both contracts were signed on the same day.

[17] Further if the bigger contract was the one that the parties have agreed to supercede the smaller sum contract, why wasn't the smaller sum contract destroyed? Why was the defendant allowed to have the original of the smaller sum contract?

G

[18] It cannot be denied and based on the evidence adduced the defendant had proved on a balance of probabilities that the governing contract was for the smaller sum of RM7.9 million.

H *Whether The Bigger Sum Contract Was Entered Into For The Purpose Of Satisfying MIDF On The Amount Of Loan Applied For By The Defendant*

[19] I find the explanation of the defendant through DW1 more credible and consistent with the conduct of the parties.
I His explanation was that the smaller sum contract was the one that the parties had agreed to be bound by and that the bigger sum contract was entered into purely for the eyes only of MIDF

to assist the defendant in getting a financing of almost 100% from MIDF for the whole of the project. Whilst DW1's version is that the bigger contract was the idea and suggestion of Mr Tan Guan Hua, the managing partner of the plaintiff, the more important thing is that it takes two hands to clap and two to tango. More importantly is the fact that there were two contracts signed on the same date with the bigger contract being double the sum of the smaller one. The defendant's explanation would have a ring of truth round it as we reflect on why the need for two contracts, with one doubling the sum of the other.

[20] The loan approval letter from MIDF to the defendant dated 9 September 2005 duly accepted by DW1 on behalf of the defendant was produced and marked as exh. D9. MIDF approved a loan of RM15 million to be provided as follows:

(a) RM8,000,000 is for the financing of the construction of factory building ("Factory Mortgage Loan"); and

(b) RM7,000,000 is for the financing of the machinery/equipment ("Machinery Loan").

[21] The plaintiff argued that as the loan of RM8,000,00 was already approved as far back as 9 September 2005, it just did not make sense to the parties to have entered into a two contracts scenario. However there is a catch to the disbursements of the factory mortgage loan. It was found in para. 10 on "Conditions of Disbursement" as follows:

> (a) You shall have furnished documentary evidence to MIDF, showing that you have paid not less than 42.27% of the construction cost of the factory buildings to be financed and/or not less than 31.39% of the cost of the machinery/equipment to be financed, for every disbursement ...

[22] Moreover with respect to para. 12 on "Disbursement" it was stated as follows:

> (a) Factory Mortgage Loan
>
> The Factory Mortgage Loan shall be made no the basis of 57.73% of the construction cost of the factory buildings to be financed against the presentation of engineers'/architects' certificates on the construction cost of the factory buildings together with the payments made thereto.

[23] It is of course true that whilst the factory mortgage loan was for RM8 million yet the disbursement of it will be against the defendant confirming through the plaintiff that the plaintiff had been paid the 42.27% of the amount certified by the engineers' certificate before MIDF would release its portion of 57.73% of the construction cost. It therefore does not take an understanding of rocket science for one to see the obvious, which was that to get a full disbursement of RM8 million of the factory mortgage loan, the construction cost would have to be RM14 million. Hence the need to obfuscate the obvious by oblitering the original contract sum and officially but overtly doubling the construction cost to yield a sum of about RM14 million in the subtotal above in the last column. When 57.73% is being released it would yield roughly RM14 million!

[24] In a very real sense, the jigsaw puzzle is now beginning to fit together. However for a full fit one would have to look at subsequent conduct of the parties to see if it support the above premise.

[25] The various confirmation letters duly given by the plaintiff to MIDF of the amounts that it had received from MIDF and the defendant to fully settle the amount certified as due under each of the engineers' certificate are most telling and damning of the plaintiff's claims under the first suit as well as the second suit.

[26] Granted some of the confirmation letters were signed and some were not signed by the plaintiff. However I can accept the explanation of the defendant that what the plaintiff was required to do was to sign and affix the plaintiff's rubber stamp on the duplicate of the said confirmation letters and so the copy sent to the defendant might not always be rubber-stamped and signed by the plaintiff. It is only too obvious, as pointed out by the defendant that if the defendant had not in fact paid the difference of 42.27% being the portion that the defendant had to pay on its own, MIDF would not proceed to release for the next certificate of progress payment and the succeeding ones, both out of prudence lending practice as well as in compliance with the conditions of disbursements in the loan approval letter.

[27] Prudence because if the plaintiff as the contractor was not paid in full, it might declare the defendant in breach of the contract and terminate it for non-payment in which case the

project might be stalled. Failure of MIDF not to disburse in accordance with the terms might afford a defence by the two guarantors stated in the loan approval letter who had every reason to believe that MIDF would comply with the conditions of disbursements when they agreed to stand as guarantors.

[28] A typical letter of request for confirmation at p. 5 of bundle B1 referred to above is reproduced below:

Malaysian Industrial Development Finance Berhad
195A, Jalan Tun Razak
P.O. Box 12110
50939 Kuala Lumpur
Tel: 03-21610066/21611166
Fax: 03-21615973
www.midf.com.my

Our Ref: APP/LD/I/152A/2

December 29, 2006

Guan Heng Construction Works
Lot 2882, Batu 4
Jalan Maharajalela
36000 Teluk Intan
Perak Darul Ridzuan

Dear Sirs,

IMM White Button Mushroom (M) Sdn Bhd

On behalf and at the request of the abovenamed company, we have on December 29, 2006, remitted a sum of RM1,011,298.00 into your account no. 723-105470-7 with OCBC Bank Berhad, Teluk Intan Branch to fully settle Certificate No. 3 dated December 18, 2006 issued by M/s Koh Perunding on the construction of a single-storey factory block comprising mushroom farm, composting factory, a 2-storey office building and a single-storey hostel.

Kindly acknowledge receipt and confirm that with this payment, the amount due under the abovementioned certificate has been fully settled by signing on the duplicate copy of this letter and returning the same to us within 7 days from the letter thereof.

A Yours faithfully,
for Malaysian Industrial Development Finance Berhad

Sgd
Ida Suriana Mohamad Salleh
Manager (Central Region I)
B Projects Department

[29] A typical duplicate copy of the said confirmation letter is reproduced below:

C To:
Malaysian Industrial Development Finance Berhad
195A, Jalan Tun Razak
P.O. Box 12110
50939 Kuala Lumpur
Attn: Ida Suriana Mohamad Salleh

D We hereby acknowledge receipt of your remittance for the sum RM1,011,298.00 into our account no. 723-105470-7 with OCBC Bank Berhad, Teluk Intan Branch to fully settle Certificate No. 3 dated December 18, 2006 issued by M/s Koh Perunding for the construction of a single-storey factory block comprising
E mushroom farm, composting factory, a 2-storey office building and a single-storey hostel.

We hereby confirm that with this payment, the amount due under the said certificate has been settled in full.

F Sgd
Authorised Signatory
On behalf of Guan Heng Construction Works

Tan Chong Meng
Full Name and Designation (in Block Letters)

G Company Stamp: Guan Heng Construction Works
(IP 0210958-V)
Lot 2882, Batu 4, Jalan Maharajalela
36000 Teluk Intan, Perak, Malaysia
Tel: 05-6225612 Fax: 05-6224613

H Date: 12.1.2007

c.c. IMM White Button Mushroom (M) Sdn Bhd
SM(RMS)/M(DA&M)
SM(F&IT)

I

[30] The pattern of "letter of request for confirmation" followed by the "letter of confirmation" is so plain and predictable that it is difficult for one to resist the irresistible inference that indeed either the plaintiff had agreed to the giving of the 50% discount and so could confirm that full payment had been received or that the plaintiff is estopped from contending otherwise as it had confirmed to a third party ie, MIDF that it had indeed received the differential sum of 42.27% from the defendant.

[31] As Mr. Terence Naidu for the defendant pointed out: p. 1 of B1 MIDF wrote to the plaintiff to say that RM757,089.35 is to fully settle Certificate No. 1. That can be cross-referred to the architect certificate on p. 196 of B1. This pattern proceeded until Cert No. 6. Acknowledgment of full payment was signed for Certificates No. 3, 4 and 6 on pp. 6, 8 and 12 of B1.

[32] A typical certificate from Koh Perunding would read as follows at p. 196 of B1:

Koh Perunding
Consulting Civil & Structural Engineer
13, Jalan Labrooy, 30100 Ipoh
Perak Darul Ridzuan

Certificate No: 1 For period ending: 12 October 2006

Contract:	**Proposed Construction And Completion Of Cadangan Membina Sebuah Kilang Ladang (White Button Mushroom) Dan Kilang Baja Dengan Sebuah Pejabat Dua Tingkat Dan Sebuah Asrama Satu Tingkat Di Atas Sebahagian PT. 1178, Mukim Kota Setia, Daerah Perak Tengah, Perak Darul Ridzuan For M/s Imm White Button Mushroom (M) Sdn Bhd**
Contractor:	M/s Guan Heng Construction Works
Contract Sum:	RM 15,821,873.00
Variation Of Contract:	RM 0.00
Total:	**RM 15,821,873.00**

Value Of Work Executed:	RM 1,457,146.00
Value Of Materials On Site:	RM 0.00
	RM1,457,146.00
Deduct: Retention Sum 10% x RM1,457,146.00	RM 145,714.60
	RM1,311,431.40
Less: Previous Certificate	RM 0.00
Payment Recommended	RM1,311,431.40

We hereby certify that M/s Guan Heng Construction Works have supplied materials and executed works in accordance with the Contract entitling them to a payment of Ringgit Malaysia: One Million Three Hundred Eleven Thousand Four Hundred Thirty One and Cents Forty Only.

[33] The 50% discount or rebate or reduction or deemed payment by whatever name called was of course just an euphemism to explain the evasive which was that for all intents and purposes, the payments are deemed to have been paid by the defendant before the disbursements of MIDF's portion 57.73% to the plaintiff as against each certificate of payment. It was something to be kept away from the eyes and ears of MIDF. It was at best equivocal and at worst, egregious. For who could predict the response of MIDF if they were to discover the device that the parties had designed to distract them from the truth at best or to deceive them at worst.

[34] PW3, the site supervisor of the plaintiff who signed the various letters of confirmation of payments received from the defendant when confronted with this under cross-examination could only give the lame excuse that he did not understand what he had signed. This court can only say that a businessman is deemed to know the contents of what he had signed in a commercial correspondence or contract. The plaintiff cannot say they do not know what they sign as business men are deemed to know the nature of documents that they sign especially here when a contractor is confirming to third parties that payments have been

received. See the case of *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640 where it was observed as follows by His Lordship James Foong J (later FCJ) at p. 643:

> *A person who chose to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and, he is prevented from denying the contents therein do not bind him.* In this case, the appellant never denied that he executed the Deed of Guarantee nor, disputed to the terms therein as not being the terms agreed upon by him. In fact he admitted expressly that he signed the Deed of Guarantee and, knew that it was a Deed of Guarantee. He did so to "convince" the 1st defendant to buy the tractor. The terms and conditions in the Hire Purchase Agreement was never disputed by the appellant to be incorrect or, otherwise than those tendered by the appellant himself on behalf of the 1st defendant when he applied for such facilities to the respondent. Both the hire purchase agreement and the Deed of Guarantee were executed at the same time and, there was no dispute by the 1st defendant on the contents of the Hire Purchase Agreement. Though the relevant particulars of the Hire Purchase Agreement was then left blank, this document was at the material time part and parcel of the Deed of Guarantee and, if the appellant permitted others to fill up the particulars of both these documents he has to accept full responsibilities for such actions. (emphasis added)

[35] Otherwise it would be very easy for one to resile from what one has signed as signifying one's agreement, acknowledgment and affirmation only to avoid it at another time. Both the sanctity and solemnity of a contract would be seriously compromised such that nothing is sure and sacred. What a sorry state of affair that would be!

[36] It was of course a clever device designed to cause if possible no discernible damage to MIDF but delivering every delectable disbursement on the designated events of the presentation of the certificates of payments! Is it more of a white lie which hurts no one and pricks nobody's conscience? Or is it more like a case of Pinocchio's nose that got longer and longer with each less than truthful confirmation to the various certificates of payments? Whether such a smart scheme should be struck down with the consequence that the plaintiff should not be allowed to claim for what is due to it even with respect to the original smaller sum contract is the subject for consideration shortly.

[37] Then there were the various receipts said to have been issued by the plaintiff to the defendants for the various amounts that corresponded with the 42.27% discount or portion deemed paid by the plaintiff. They are at pp. 283 to 291 of B2. Plaintiff said as only the photocopies are produced without the originals then in the absence of a reasonable explanation as to where the originals had gone, this court should reject the receipts as evidence. I find the explanation of DW1 quite candid:

> These receipts were given on each progress claim by fax as I recall now. Subsequently the copy was given to me but I can't recall what happened to these documents. All I have are the copies only.

[38] I must contrast that with PW2's explanation. His explanation was that he was not sure if the receipts were issued by the plaintiff. When asked whether the receipts issued in between the ones so-called issued to the defendant were genuine, his answer was that they were genuine ones. If that be true, then it cannot be a case of the receipt books having gone missing and only discovered some three years later and then quickly lodging a police report by his father Mr Tan Guan Hua only on 4 December 2010. Surely the loss of the receipt books would have been discovered at the end of each accounting year as the first receipt was dated 16 October 2006. The staff in charged of the receipt books were not called to explain whether the receipts issued to the defendant had been prepared by her. The plaintiff also did not call Mr. Tan Guan Hua, the principal partner who negotiated the terms with DW1 and who, DW1 said, agreed to the arrangement on the issuance of the receipts with the cheque particulars of the defendant stated in every receipt issued. The plaintiff did not call these witnesses and this is a fit and proper case to invoke s. 114(g) of the Evidence Act 1950 in that if these witnesses had been called, their evidence would not be favourable to the plaintiff. Moreover the plaintiff had not produced the format of their receipts to show that the ones produced by the defendant could not have been from the plaintiff especially the computer-printout format for four of the receipts at pp. 290-291 of B2.

[39] This is a case calling for the application of s. 65(1)(c) of the Evidence Act 1950 which reads: A

> 65. Cases in which secondary evidence relating to documents may be given.
>
> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases: B
>
> …
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time; C

[40] I draw support for the above proposition from a case across the Causeway in Singapore in *Kalki Jewellery (Suing as a Firm) v. Mani Samikkannu* [2000] 2 SLR 179 where Rajendran J observed as follows which respect to their s. 67(1)(c) which is in *pari materia* with our s. 65(1)(c): D

> 32. I will now deal with the objections raised by counsel for the plaintiffs to the admissibility of the copies of the packing lists (DB.14, 15 and 17) on which KR allegedly acknowledged receipt of the three consignments. E
>
> Mr Rengarajoo submitted that these three exhibits were not admissible because the original thermal copies of the faxes said to be received were not produced. This submission, however, did not take into account s. 67(1)(c) of the Evidence Act. It is common knowledge that thermal copies of faxes disintegrate and it is almost standard commercial practice to make photo-copies of such faxes for filing. In such a situation, s. 67(1)(c) could apply. The affidavit evidence-in-chief of Mani, however, did not contain any explanation as to why Mani had not produced the original fax that he received. Counsel for Mani, Mr Ramalingam Kasi, sought leave to adduce that evidence. I granted leave. Mani then testified that his fax machine used thermal paper which would fade in time and that it was his practice to photo-copy incoming faxes and keep only the photo-copies. In the light of that evidence I was satisfied that this was a proper case to allow secondary evidence of the contents of the fax to be introduced, I ruled that DB.14, 15 and 17 were admissible in evidence. F G H I

[41] Even if I were to attach very little weight to these receipts, I can still accept the oral evidence of DW1 that receipts which corresponded to the balance portion of each claim representing 42.27% of the amount certified for payments were issued with each claim by the plaintiff.

[42] To bring this analysis to a close, it must be observed that there was no reminder of the amount outstanding due on every certificate of payment as with the passage of each certificate of payment the sum outstanding accumulated and added up to RM7,324,892.16 by the time the contract was mutually terminated. PW1 the consultant and a witness for the plaintiff testified that there were no complaints raised in the various periodic meetings held throughout the project on the so-called non-payments based on the various certificates of payment issued by him. In fact right up to the last certificate of payment, PW1 confirmed that the plaintiff had not raised any complaint of non-payment by the defendant on the previous certificates of payment. Having to decide whether it was a case of latitude and the luxury of time given by the plaintiff to the defendant to pay or more a case of there was nothing outstanding to be claimed and hence no demand made, I would in the circumstance of the case opt for the latter as being more in line with commercial reality.

Whether The Plaintiff Is Liable To The Defendant For Defective Works In The Uneven Sinking Of The Factory Floor

[43] The defendant filed a counterclaim and set-off against the plaintiff in the first suit, Suit No: 22-302-2009. It was for the sum of RM907,039. This was the sum estimated by its consultant Koh Perunding who through PW1 gave evidence on behalf of the plaintiff. The estimates were at p. 282 of Bundle B2. It is thus part of the plaintiff's case. It is common ground that after the factory floor sank the first time, rectification works were done and the floor still sank. Who is to be held liable for the sinking floor?

[44] Both the consultant and the contractor are blaming the defendant. It is quite common that when there is a problem in any project, everyone involved would try to look for a scapegoat. The consultant said that he had advised the defendant on reinforced concrete (RC) piling for the floor. If so, than from a professional standpoint he should have dissociated himself from the project or at least put his professional opinion in writing and bring

home to the defendant that the defendant must bear the risk should the factory floor sink. However, his own evidence was that the defendant did query him on why there was no piling for the floor after the floor sank the first time and that he (DW1) seemed surprised that there was no piling.

[45] The fact that the plaintiff is to do the soil investigation before development commenced is clearly stated in the drawings submitted at p. 175 of B1 in para. 14. PW3 who was the site supervisor said he was unaware of the soil investigation that was needed to be done. Both the consultant and the contractor are to ensure that the filling of the earth is done properly before building.

[46] The court also looked at the sum that the plaintiff had charged of RM103,000 plus for preliminaries including earthworks both from the quotation at p. 199 of B2 and from the summary of tender at p. 295 of B2. The plaintiff referred to p. 85 of B1 where the defendant is said to have excluded earthworks from the tender. However it was admitted by the plaintiff that it did not have to buy the earth as it was provided for by the defendant and so also was the clearing of the earth of trees and undergrowth which was done by another contractor. As a contractor the plaintiff would have known that compaction of the earth is necessary before construction commenced.

[47] The consultant testified of a layer of foliage being discovered beneath the soil when the rectification work after the first sinking was done and that the sinking is probably due to poor workmanship as well. Page 166 of B1 of the contract referred to Bakau Piles in general and p. 167 of B1 referred to Pile Testing. Clause 3.1 at p. 168 of B1 referred to "All tests shall be carried out under the direction of an experienced and competent contractor's supervisor with approved test equipment and test procedure as specified hereunder." Clause 9.1 of p. 171 of B1 in the contract further provided that results shall be submitted as a signed summary in duplicate to the SO immediately on completion of the test. However at the trial the consultant did not produce any of these reports other than saying that the sinking of the floor could be due to poor workmanship. His reluctance to admit this is understandable as being the SO and the supervising engineer of the project he is required to supervise all works carried out on the project. See para. 13 at p. 175 of B1.

[48] The consultant recommended Bakau Piling to be done to rectify the factory floor after it sank the first time. PW1 agreed that once a floor had sunk before, there would have been movement in the earth and that careful and complete compaction of the earth would be crucial and critical. He would have to exercise closer supervision. However the factory floor sank unevenly a second time after rectification!

[49] Under cl. 1(a) at p. 95 of the contract, it is stated that the contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the SO/Engineer including (iv) the removal and/or re-execution of any works executed by the contractor. It reads:

> The Contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the Superintending Officer/Engineer ... in regard to:
>
> (iv) The removal and/or re-execution of any works executed by the contractor.

[50] I disbelieve the plaintiff witnesses PW2 and PW3 when they said that they have executed the works especially the flooring properly. Their initial desire to claim for a double amount when evidence is telling otherwise would constrain the court to view their entire evidence with great circumspection.

[51] It is not uncommon for the contractor to blame the consultant and *vice-versa*. At the end of the day the consultant being the SO and engineer of the project cannot abdicate and abandon its responsibilities of supervising the contractor to ensure that the factory is built according to the plans, drawings and specification. Likewise the contractor has to own up to any poor workmanship that in all probability was the cause of the floor sinking.

[52] Clause 18(a) of the contract at p. 103 of B1 reads:

> 18(a). Any defects, shrinkages or other faults either of materials or workmanship, which may appear within the Defects Liability Period stated in the Appendix hereto or if none stated then within six months due to materials or workmanship not in accordance with this contract shall within a reasonable time after receipt of the Superintending Officer/Engineer's written instruction be made good by the Contractor and at his own cost.

[53] There is no doubt in my mind that the plaintiff is liable to the defendant in the defendant's counterclaim for the sinking floor, as clearly that is defective works. The plaintiff having called the consultant in PW1 to testify on its behalf, and PW1 having made no admission that it was a design defect, the plaintiff could not call anyone else to discharge the evidential burden that the sinking of the factory floor was because of a design problem. If it was not a design problem then it would be in all probability caused by poor workmanship in the compaction of the earth after filling. It does not help PW1 or the plaintiff to say that no piling was recommended the first round because the defendant wanted to save costs and the second round Bakau Piling was recommended because it is cheaper than RC piling when as PW1 argued, it should have been RC piling from the very start. As a professional PW1 surely would not want to lend his name to a project where the floor sank. He surely would have at the very least put in writing advising the defendant on the risk involved. Better still to take a stand that it has to be his way or no way at all!

[54] The question is whether the defendant is entitled to the sum estimated by the consultant PW1, a witness for the plaintiff, to rectify the defect when in fact those expenses have not been incurred yet. Is it a fit and proper case for the sum retained to be forfeited to the defendant as damages for the rectification of the sinking floor? This shall be explored in the next discussion under the principles applicable.

Principles

Whether The Contract For RM15.8 Million Was A Sham Contract And That The Plaintiff Are Estopped From Asserting That Parties Are Bound By The Said Contract

[55] In the House of Lords' case of *AG Securities v. Vaughan & Ors* [1990] 1 AC 417 Lord Justice Bingham explained a 'sham' agreement as follows:

> A written agreement is a sham where it incorporates clauses by which neither party intends to be bound and which is obviously a smokescreen to cover the real intentions of both contracting parties: *Hadjiloucas v. Crean* [1987] 3 All ER 1008, 1014, per Purchas LJ The accepted definition of a sham is that given by Diplock LJ in *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786, 802:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* [1882] 21 Ch D 309, CA and *Stoneleigh Finance Ltd. v. Phillips* [1965] 2 QB 537), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.
>
> Put more shortly, a sham exists where the parties say one thing intending another: *Donald v. Baldwyn* [1953] NZLR 313, 321, per FB Adams J.

[56] It is clear from the terms of the factory loan from MIDF that MIDF would only release 57.73% of the amount certified as due under the construction of the factory to the plaintiff provided the plaintiff had confirmed to MIDF that it had received the balance 42.27% due on each certificate of payment from the defendant. Thus to get full financing as it were, this device of a contract for double the real sum had been entered into which was no doubt a sham contract for the purpose of satisfying MIDF for the loan of a bigger sum. Parties had never intended to be bound by it but by the contract for only half that sum.

[57] In fact by a series of conduct and correspondence referred to in the above analysis, it can be said that the plaintiff is now estopped from asserting its claim under the bigger sum stamped contract. The plaintiff cannot confirm to a third party in MIDF that the balance 42.27% have been paid under each certificate of payment and then *inter se* between it and the defendant, claimed otherwise. As was observed by His Lordship Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 at pp. 294-295; [1995] 3 MLJ 331 at pp. 344-345, the doctrine of estoppel can be applied in a wide variety of circumstances:

The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v. Calgary Milling Co Ltd* [1919] 48 DLR 295; *De Tchihatchef v. Salerni Coupling Ltd* [1932] 1 Ch 330; Taylor Fashions.

[58] Here too, the court would allow the doctrine to be applied in a situation where the parties have conducted themselves based on the smaller sum contract and had by the device of a 50% discount, or that of deemed payment as in the various confirmation of payment letters from the plaintiff to MIDF.

[59] In fact the plaintiff is estopped from introducing evidence of non-payment based on the bigger sum contract of RM15.8 million by virtue of s. 115 of the Evidence Act 1950 which reads:

> **115. Estoppel**
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[60] It is true that the word "estoppel" or "estopped" does not appear in the defence of the defendant but here is a case where the facts of estoppel have been germane in the pleadings and indeed introduced at the trial by the defendant and the plaintiff had every opportunity at the trial to explain it away and which it tried though not convincingly at all. I would gladly adopt the approach taken in *Boustead Trading* case *(supra)* as follows at p. 292 (CLJ); pp. 341-342 (MLJ):

> In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped'. (See, *Lal Somnath Singh & Ors v. Ambika Prasad* AIR [1950] All 121 at p. 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at p. 320.
>
> …
>
> *… where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded*: *Oversea-Chinese Banking Corp Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1. (emphasis added)

Whether The Contract For RM15.8 Million Was Designed To Deceive MIDF And The Authorities And Hence Is For An Illegal Purpose And Thus Is Void

[61] Here is a case where the defendant had not pleaded illegality. Rather the defendant had used the euphemism of the plaintiff agreeing to a 50% on the contract sum! The court was concerned that this method of entering into a sham contract for the eyes of third parties has a tendency to foster less than transparent dealings both with third parties lender and may also be a deception on the Inland Revenue office. The very word "sham" itself denotes something of a subterfuge; somewhat slimy and sleazy. It conjures up the images of a device to deflect and distract attention and even deceiving the unsuspecting. The proper approach to be taken when a contract is not *ex facie* illegal but that the purpose of so entering into it may be for an illegal purpose, is that set out in the Federal Court case of *Seven Seas Supply Co v. Rajoo* [1965] 1 LNS 164; [1966] 1 MLJ 71 at 73-74. Though more than four decades ago, it is still a sound approach to follow. It reads:

> There remains the only other point of substance raised by the defendants that the loans were illegal and void under the provisions of the Moneylenders Ordinance, 1959 (No. 58 of 1959) and consequently not recoverable by the plaintiff. The ground of appeal was framed in this way:
>
> > That on the evidence the learned judge ought to have found (*albeit* that this was not pleaded by the defendants but referred to in the affidavit sworn by RMK Naidu on the 9th of December, 1961) that the plaintiff was a moneylender and, there being no suggestion that he was licensed as such, that the loans made by the plaintiff were illegal and void and hence not recoverable by him.
>
> This defence was not pleaded.
>
> Now it is well settled law that where a contract is *ex facie* illegal, the court will decline to enforce it, irrespective of whether illegality is pleaded or not.
>
> The position is succinctly stated by Devlin J in *Edler Auerbach* [1949] 2 All ER 692 at p 697 cited with approval in *Snell Unity Finance Ltd* [1963] 3 All ER 50 at p 55 in this way:

A "That case" (*North-Western Salt Co Ltd Electrolytic Alkali Co Ltd* [1914] AC 461) "authorises, I think, four prepositions: first, that where a contract is *ex facie* illegal, the court will not enforce it whether the illegality is pleaded or not; secondly, *that where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded*; thirdly, that where unpleaded facts, which taken by themselves show an illegal object have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), **the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it**; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

The court therefore ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence.

So far from being certain that all the relevant facts were before the court it appeared to me that essential evidence was missing.

The question of whether the plaintiff was a moneylender was disputed. The plaintiff was asked if he was a moneylender but he denied it and also the fact that the defendants had ever paid him interest. The matter was never explored in any detail nor given that close examination, it should have received and no doubt would have if it had been in issue and pleaded.

In these circumstances it is impossible to say that all the relevant circumstances relating to the question of whether the plaintiff was a moneylender or not were before the court.

I have come to the conclusion that the plaintiff is right in his contention that the third of those propositions enunciated by Devlin J. covers this case ie, **the court will not act on unpleaded facts unless it is satisfied that the whole of the relevant circumstances are before it.** (emphasis added)

[62] A contract to construct a building, I would reckon, can be entered into for any sum that both parties negotiating at arm's length are prepared. On the surface if a contract is doubled in sum from its original sum and the parties are comfortable with it, then there is no business of any third party to be indignant and

inflamed about it. However, it is a different dimension entering into the pale of the profane, when there are two different contracts for the same project for two different purposes: one the genuine between the parties *inter se* and the other a sham for the unsuspecting.

[63] Be that as it may, there is a term in the loan approval letter of 9 September 2005 marked as exh. D9 where at para. 9(f) it is stated that:

> You shall have furnished to MIDF a valuation report on the Land to be financed, as certified by an approved Valuer, wherein the estimated value shall not have a negative variance of more than 10% from the stated value of RM5,600,000.

[64] Perhaps that was the overriding concern of MIDF and in any event, as the matter was not pleaded by the defendant, it was rather late in the day for the parties especially the plaintiff to call MIDF to testify. In other words, not all relevant facts were before the court and in particular whether MIDF had been deceived into believing that the contract was for the bigger sum to justify a bigger loan. I would suppose all prudent financiers would have their team of independent professionals to do their own evaluation and valuation of a building construction costs. Whilst a bigger loan might have been secured, it is still incumbent on the defendant to make repayments of the factory loan. So too the directors who guaranteed the loan have to guarantee the same for a bigger amount now.

[65] As for Inland Revenue concerns, it is arguable as to whether the device of a 50% discount is a genuine loss of income which the plaintiff is permitted to give or whether it should still pay tax on the bigger amount. No evidence was led by the defendant to show that such a device was indisputably an illegal tax evasion exercise and not an ingenious tax avoidance arrangement.

[66] Here is a case where this court has held that the contract for the smaller sum was the contract that the parties had agreed to be bound by and that the contract for the bigger sum was a sham. This court in the light of the clear evidence negating and negativing the bigger sum contract, would not allow the plaintiff to resile from what the parties had agreed and further supported by pattern of conduct in the written confirmation to MIDF by the

A plaintiff that the differential had been received. We now know from the evidence adduced that the differential had been derived from the bogus bigger sum contract when in fact there was none and a clever device to obtain a bigger loan.

B **[67]** To allow the plaintiff to sue based on the sham contract for a bigger sum would be unconscionable. Not to allow the parties to claim against each other at all for having participated in an arrangement less than proper would also create a situation too grievous for the parties to bear. What if the contract had been C drafted such that the whole of the agreed sum or such certified sum is paid only upon completion or termination as the case may be? Would the plaintiff be denied its entire claim just because the parties had openly between themselves entered into two contracts: one genuine and the other a sham one? The converse is also D relevant: what if the works are defective as in this case? Would the defendant be barred from claiming for costs of rectifying the works?

[68] I take the view that where a party can found its claim based E on the genuine contract and not on the sham contract, then so much of that which can be saved in the genuine contract may be enforceable. Likewise too where a party unconscionably tried to capitalise on the situation by claiming based on the sham contract, the court will restrict the claim to just the genuine contract. Here F the court takes into consideration that illegality was not pleaded by the defendant and that all the relevant facts as to whether anyone was deceived were not before the court. Such an approach has the approval of some high authorities and for this I would refer to the Court of Appeal case of *Ong Thean Chye & Ors v. Tiew Choy Chai & Anor* [2011] 1 CLJ 674 at p. 708 where G His Lordship Abdul Malik Ishak observed:

> [68] Our courts will not enforce contracts which are tainted with illegality. But the factual situations giving rise to judicial intervention on the ground of illegality are so varied that they defy H general or easy classification. Bingham LJ in *Saunders v. Edwards* [1987] 2 All ER 651, at pp. 665 to 666 showcased the attitude of the courts to claims of illegality in these trenchant terms:
>
> > Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two I unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a

party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.

On the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn.

[69] Courts too will not lend its aid to enforce pretended obligations. Only real obligations will be enforced (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, FC; *Seascope Sdn Bhd v. Syed Izhar Syed Salleh* [2005] 8 CLJ 624, HC; *Lee Pooi Chun v. Lee Kah Gee* [1971] 1 LNS 59, FC; and *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115, PC).

[69] In *Sardara Ali v. Sarjan Singh* [1957] 1 LNS 78; [1957] 1 MLJ 165 at 166 the Court of Appeal in allowing the appeal, held as follows:

For the purposes of the present argument it may be accepted that the plaintiff and the defendant practised a deceit on the public administration of this country in order to get a haulage permit for the vehicle. I am unable to agree, however, that the plaintiff had to prove this in order to prove his case in the present proceedings. The action was not in contract. It was an action for trespass to goods. In order to succeed in it the plaintiff had to prove that he was in possession of the lorry and that the defendant seized and took it away. The defence was that it was not the plaintiff's lorry. The plaintiff's reply to that was that it was his lorry. There was no need for him to go into the question of how the lorry came to be registered in the name of the defendant except by way of anticipating any argument that might be set up on behalf of the defendant based on that registration. The lorry became his as a result of one or possibly two agreements with the defendant which may well have been bad as being contrary to public policy, but the consideration that these agreements were bad did not prevent the property in the lorry passing to him (see *Simpson v. Nicholls* 3 M & W 240 244 and *Scarfe v. Morgan* 4 M & W 270 281). The property having passed and the plaintiff having obtained possession I fail to see why the plaintiff should not have his possession protected and his property or its value restored to him.

[70] The court is of course concerned that it should not be unwittingly perceived as sanctioning a commercial arrangement that was less than proper. Here the court can separate the wheat from the chaff and the sham from the substance of the contract; as the RM15.8 million contract was a sham and thus unenforceable, the amount which was half of that of RM7.9 million was in substance what the parties had agreed to be bound and enforceable. The saving grace here was that the building was built *albeit* that the floor sank and sank again after rectification. This court in the interest of justice is prepared to decide the parties obligations on the part that they have agreed to be binding, ie, obligations based on the initial sum of RM7.9 million.

Whether The Defendant Is Entitled To Forfeit The Retention Sum As The Factory Floor Remains Unrectified After Having Sunk A Second Time

[71] Having found that the plaintiff is liable for the costs of rectification of the factory floor that sank a second time, the question is how to assess the damages for the damage caused to the defendant. I accept the contention that the estimated of PW1 who is not a quantity surveyor (QS) might not be as accurate as one done by a QS. The estimated costs of rectification appearing at pp. 302 and 303 of B2 is RM907,039. However I cannot accept the plaintiff's contention, through its learned counsel Mr Joseph Ting, that just because the defendant had not expanded the costs then it is not in a position to claim damages which must be strictly proved and in such an instance where it cannot be strictly proved, then only nominal damages is claimable. In this respect it is apposite to set out once again the principles governing assessment of damages said in the context of rectification works of a building in the Court of Appeal case of *Dodd Properties Ltd and Another v. Canterbury City Council and Others* [1980] 1 WLR 433 at pp. 456-458 where Donaldson LJ observed as follows:

> The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage, or, occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to

take the cost of repair or reinstatement. Which is appropriate will depend upon a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in-between situations.

Happily there is no issue in the present case as to which measure of damage falls to be applied. It is the cost of reinstatement. The primary issue is as to how and, more particularly, on what date those costs are to be assessed. This is a very significant issue in the light of the increase in costs over the period between the occurrence of the damage in 1968 and the trial in 1978.

Mr. Popplewell, for the defendants, submits, and I for my part would readily accept, that the general rule is that damages fall to be assessed as at the date when the cause of action arose. The rule is so stated by Lord Wilberforce in *Miliangos v. George Frank (Textiles) Ltd.* [1976] AC 443 at 468. And I am inclined to think that in normal circumstances this would be applicable where the relevant measure of damage was diminution in the capital value of the property. But it is only a general or basic rule and is subject to many exceptions. Thus damages for personal injury, excluding consequential loss to which other principles apply, are assessed in the light of the value of money at the date of the hearing. The issue here is whether the assessment of damages based upon the cost of repair or reinstatement is another exception as Mr. Titheridge for the plaintiffs contends. I think that it is.

In *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation* [1970] AC 874, the House of Lords was faced with the problem of whether the reasonable cost of equivalent reinstatement, which was the basis of compensation under the Land Compensation Act 1961, involved taking costs which prevailed at the date of the notice to treat or those which prevailed at the earliest date when the claimants might reasonably have begun rebuilding. The decision was in favour of the latter. Lord Reid, at p. 894, cites with approval various statements on the measure of compensation which assume that the assessed cost of reinstatement would be sufficient to enable the owner to undertake the work if he acted reasonably. In an era of rising costs, this could only happen if compensation was assessed on the basis of costs applicable at the time at which reinstatement would in fact occur, on the assumption that the owner acted reasonably. Again Lord Morris of Borth-y-Gest said, at p. 903:

> The reasonable cost, depending upon the facts of particular cases, will be **the actual reasonable cost which a claimant has incurred** or **can be expected to incur**; it will be such cost at the time when equivalent reinstatement reasonably does or should take place.
>
> Whilst this is not a decision on the measure of damages in tort, I think that the reasoning is directly applicable to the present problem. It is also only common sense, for, as Mr. Titheridge pointed out, it would be wholly unfair to the defendant to charge him with the costs applicable to reinstatement in 1968 when the damage occurred, if the actual reinstatement took place at a later date when improved technology had reduced the cost. That this happy situation has not in fact arisen does not affect the point of principle.
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> In the absence of special and extraneous factors, there is no divergence between the interest of a plaintiff and a defendant on the choice of the most propitious moment at which to effect reinstatement. Both wish to achieve the maximum economy, at least so long as the plaintiff is in doubt whether he will be entitled to a full indemnity from the defendant.
>
> It follows that, in a case in which a plaintiff has reinstated his property before the hearing, the costs prevailing at the date of that operation which were reasonably incurred by him are *prima facie* those which are relevant. Equally in a case in which a *plaintiff has not effected reinstatement by the time of the hearing, there is a prima facie presumption that the costs then prevailing are those which should be adopted in ascertaining the cost of reinstatement.* There may indeed be cases in which the court has to estimate costs at some future time as being the reasonable time at which to reinstate, but that is not this case.

[72] It can thus be confidently stated that the fact that the defendant has not effected the rectification works to the sinking floor does not prevent it from making a claim on what is a *bona fide* reasonable assessment of costs to be incurred in rectifying the defects. Taking into consideration that the SO/Engineer in Koh Perunding should take some blame and responsibility for poor supervision of the factory flooring works and coupled with the poor workmanship of the plaintiff as contractor, one will have to make an assessment as to what is a reasonable assessment of damages that the plaintiff should pay for the floor that had sunk unevenly. Otherwise an impecunious injured party would not be able to make a claim if he has to wait until he has the funds and

then do the rectification works for by then limitation would have set in. It would be a double blow for the injured party. Here it can be appreciated that the factory floor being uneven after sinking, it was difficult for the machinery to be firmly affixed not to mention dangers posed to staff and with production having being delayed, one can imagine the cash flow problems that would be snow-balling.

[73] In fact in the Singapore High Court case of *Afro-Asia Shipping Company (Pte) Ltd v. Da Zhong Investment Pte Ltd & Others* [2004] 2 SLR 117, the plaintiff's building had tilted, cracks had developed, floors had sunk and seepage of water had occurred because of works done in the first defendant's land when it constructed a building on its land called Robinson Centre. When the plaintiff sued the first defendant and other defendants being the consultants and contractors who worked on the building for negligence and claimed based on a quotation of the rectification works, it was argued that as the amount had not been incurred yet then the plaintiff would only be entitled to mere nominal damages. Her Ladyship Judith Prakash J followed a simple commonsensical approach when she observed as follows:

> [129] *All the arguments made about the plaintiffs trying to get cash before the building was sold or that rectification was unnecessary had no legal foundation. A plaintiff whose land and building has been affected is entitled to be compensated for the damage. He may apply the money for repairs or he may not*. In this instance, the plaintiffs would wish to apply the quantum awarded to the building. The building when sold (if that ever came to pass) would certainly fetch a value in keeping with its state before all the works of the defendants started ...
>
> [133] On the facts before me, I consider that the damages payable by the first to third defendants for the damage caused to AA Building should be assessed on the basis of the diminution of the capital value of AA Building as at the date of this judgment ie what the price of the building would be if it was sold on the date of this judgment in an undamaged condition as opposed to the price it could expect to fetch on the same day in its present condition. *I do not think it is correct to order nominal damages. Obviously, substantial damage has been sustained and this most probably, would have a more than nominal effect on the price of the building even though much of the value of the site on which AA*

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> *Building stands may reside in its development potential.* I also think it correct to send this issue for assessment as the trial was ordered to be on the liability issue only and the issue of whether the diminution in value basis for the assessment of damages was the correct one only arose in the course of the trial. (emphasis added)

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[74] In the above case the Singapore High Court had decided that the damages should be assessed based on a diminution of the capital value of the plaintiff's building as there was a consent order previously recorded in a suit the shareholders of the plaintiff that
C the building be sold.

[75] I agree that what appeared at p. 303 of B2 is merely an estimate of the costs of rectification, this time using RC piles. The costs of RM907,039 was communicated by the defendant to
D the plaintiff in their letter of 7 June 2009 by AR registered post as follows:

> We wish to bring to your attention that the floor to the factory has sunk in from 1 to 5 inches.
>
> E The cost of rectification works are estimated at RM907,039 as per figure calculated by Koh Perunding.
>
> Please let us know how you wish to resolve this issue, kindly reply to us within the next 14 days.

F **[76]** The letter was signed off by DW1. There was no evidence led as to whether there was any reply from the plaintiff. The quotation being given by PW1 and he being a witness for the plaintiff, is there a need for the defendant to call its own witness or put up further quotations? Should the court accept uncritically
G the sum quoted by PW1.

[77] I would refer to item 5 of the summary of tender as a guide where the "sum for supply, construction and completion of the compost factory including 110' x 120' open shed concrete floor,
H concrete buildings, mechanical rooms, etc. as per drawings and specifications" was stated as RM422,888. I took into consideration that the original quotation included the construction of the buildings as well. I also took into consideration that sometimes rectification works can be more expensive than the original works
I and hence the mantra of the management gurus that we should do it right the first time.

[78] It is of course elementary that one would not expect what emanated as an estimate to be exact. It has often been said that difficulty in proving does not dispense with the need to prove damages. Whilst that may be true, one must also appreciate that difficulty in proving should not disallow or deny the injured party of its claims. As it is an estimate and as the plaintiff has not called other witnesses to testify otherwise, the plaintiff cannot complain if the sum the court awards is higher than what the plaintiff thinks is fair more so when the quotation had come from the plaintiff's witness in PW1 being the consultant of the project. Neither can the defendant complain if the award given is less than what it thinks it should be as the defendant had not called its own witness to submit a report on its estimated amount for rectification works. The defendant however did submit a condition survey report at pp. 209-280 of B2, marked as exh. D4 prepared by Advanced Ground Technologies (M) Sdn Bhd setting out various options available to rectify the defects but without the estimated amount.

[79] Taking the whole circumstance into consideration, and bearing in mind that the burden should be borne partly by the consultant for a lack of supervision, the court would not allow the whole of the defendant's counterclaim for it is at best only an estimate by PW1 but the court would allow the whole sum retained to be sufficient payment for damages for the counterclaim of the defendant. As to this date the plaintiff has not rectified the sunken floor, and as that clearly is a defect, it would be justified taking the entire circumstances of the case into consideration, for the retention sum to be forfeited entirely to the defendant.

[80] The evidence of PW1 was that from his last inspection of the building during the end of the construction period, the sinking floor would not affect the stability of the building structure and the safety of the building from an engineering point of view.

[81] In the premises the court would allow the retention sum of RM395,546.83 to be forfeited to the defendant taking into account the liability that should be attributed and apportioned to both the SO and the contractor.

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Pronouncement

[82] As the parties agreed at the trial that the sum under the contract was RM319,132.50 still due under the first suit in Suit No: 22-302-2009 from the certified claims if this court were to
B allow the plaintiff's claim based on the contract for the lower sum of RM7.9 million, I had allowed the plaintiff to enter judgment against the defendant for the above sum with interest of 5% pa from date of writ to realization.

[83] As I had allowed the retention sum of RM395,546.83 as
C damages for the rectification works for the floor that had sunk, as a corollary the plaintiff's claim in the second suit in Suit No: 22-117-2011 for a return of the retention sum was dismissed. There shall be no interest on this sum.

D **[84]** As the parties had engaged in a commercial agreement or arrangement which is less than proper and one which is not approved by general public policy considering its possible deleterious effects on the lender and also the Inland Revenue, this court would make each party bear their own costs.

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